LUNG YUNG & THAI YUNG (OWNERS OF)

v.

SADIT TIMBER SDN. BHD. & ANOR.

FEDERAL COURT, KUCHING
RAJA AZLAN SHAH LP
LEE HUN HOE CJ (BORNEO)
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NO. 7 OF 1983]
17 NOVEMBER 1983

SHIPPING: *Admiralty action in rem - Claim for damages for wrongful delivery - Summons to strike out claim dismissed on grounds of limitation and jurisdiction - Foreign laws - Mode of proving.*

The respondents had claimed damages in a substantial sum against the appellants for wrongfully delivering the cargo of logs on the "Lung Yung", to a third party in Taiwan, without production of the relevant bill of lading.

The appellants filed a defence and applied by summons to strike out the claim on the grounds that it disclosed no reasonable cause of action and that it was frivolous, vexatious and an abuse of process. The application was dismissed on grounds of limitation and jurisdiction. The appellants appealed.

Held:

[1] No expert evidence was adduced and the foreign law sought to be relied on was not proved as it should have been. The summons can only be determined at a proper hearing and presentation of the requisite evidence.

[2] On the issue of jurisdiction and stay of proceedings, the learned Judge's decision was agreeable.

[Appeal dismissed with costs.]

Cases referred to:
Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 2) [1975] 2 MLJ 175
Vasudevan v. Damodaran & Anor. [1981] 2 MLJ 150

Legislation referred to:
Evidence Act 1950, s. 45(1)
Rules of the High Court 1980, O. 18 r. 19

For the appellants - Chew Pok Oi; M/s. Chan, Jugah, Wan Ullok & Co.
For the respondents - Anthony Liew & David Tiong; M/s. Goh & Liew

JUDGMENT

Eusoffe Abdoolcader FJ:

The respondents in this admiralty action *in rem* claim damages in a substantial sum in relation to the carriage of a cargo of logs on the "LUNG YUNG" from Kuala Baram in Sarawak for delivery to the respondents' order at Kaohsiung in Taiwan on an allegation that the appellants wrongfully delivered the logs to a third party in Taiwan without production of the relevant bill of lading. The appellants filed a defence and then applied by summons to strike out the statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 and

the inherent jurisdiction of the Court on the grounds that it discloses no reasonable cause of action and is frivolous and vexatious and an abuse of process. We should mention that it was disclosed in affidavit evidence that the 2nd respondent had instituted an action in the Taipei District Court in Taiwan against three parties including the owners of the "LUNG YUNG" in relation to the same subject matter as in the present proceedings, claiming damages for a like amount, and has obtained judgment but this is subject to appeals to the High Court and Supreme Court in Taiwan with the possibility of several retrials as a result of remand by the Supreme Court. The appellants' summons appears to be grounded on the issues of limitation and jurisdiction. Tan Chiaw Thong J dismissed the application on 8 November 1982.

The bill of lading provides that it shall have effect subject to the provisions of the Chinese Merchant Marine Act, 1929 or any subsequent revision thereof in force which shall be deemed to be incorporated in the bill and that if any term of the bill of lading were repugnant to that Act to any extent such term shall be null and void to that extent but no further (Clause 1). It further stipulates that any dispute arising under the bill shall be covered by Chinese Law except as may be other wise provided therein (Clause 2), and there are other terms in the bill providing for the application of foreign law.

The question of limitation turned substantially on the application and construction of the provisions of the law of Taiwan in the Act of 1929 and also its "Regulations for Clearing Imported Logs through Customs'. The whole matter appears to have proceeded on false premises in that the question in issue was presented and indeed determined by the learned Judge virtually taking judicial notice of the relevant laws of Taiwan that appeared to be applicable. This was clearly wrong as foreign law on a particular topic is a question of fact which is to be and can be proved by evidence of experts (s. 45(1) of the Evidence Act, 1950; *Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 MLJ 175 (at p. 181)). No expert evidence was adduced and the foreign law sought to be relied on was not proved as it should have been. As the question of delivery and limitation revolved around the application of the relevant statutory provisions of Taiwan, the merits of the contentions on this aspect should not have been determined in the way it was sought to be. We therefore affirmed the dismissal of the appellants' summons in this regard but on different grounds on the basis that this can only be determined at a proper hearing and presentation of the requisite evidence.

On the issue of jurisdiction and stay of proceedings, we agreed with the decision of the learned Judge for the reasons and on the authorities he has discussed. The exercise of judicial discretion by him is not to be lightly interfered with and there is a presumption that he has rightly exercised it *(Vasudevan v. Damodaran & Anor.* [1981] 2 MLJ 150 (at p. 151)).

We accordingly dismissed this appeal with costs and ordered the deposit in Court to be paid out to the respondents, and further directed an early trial of this action.

Also found at [1983] 2 CLJ 246